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16 Dba Premier Cru*

17
18 UNITED STATES BANKRUPTCY COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 OAKLAND DIVISION

21 In re
22 FOX ORTEGA ENTERPRISES, INC., dba
23 PREMIER CRU
24 Debtor.

25 Case No. 16-40050-WJL

26 Chapter 7

27 Adversary No. 18-04019

28 MICHAEL G. KASOLAS, Chapter 7 Trustee
for Fox Ortega Enterprises, Inc. dba Premier
Cru,

29 Plaintiff,

30 vs.

31 WAYNE NICHOLSON,

32 Defendant.

33 **PLAINTIFF'S MEMORANDUM OF
34 POINTS AND AUTHORITIES IN
35 SUPPORT OF MOTION FOR PARTIAL
36 SUMMARY JUDGMENT OR,
37 ALTERNATIVELY, FOR ORDER
38 ADJUDICATING FACTS EXISTING
39 WITHOUT CONTROVERSY**

40 Date: February 27, 2019

41 Time: 10:30 a.m.

42 Place: 1300 Clay Street, Courtroom 220
43 Oakland, CA 94612

44 Judge: William J. Lafferty

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1 **I. INTRODUCTION**

2 Defendant Wayne Nicholson (“Defendant”) knew that Premier Cru was operating a Ponzi
3 scheme and, in August 2013, Defendant plainly called it that. As a result of Defendant’s discovery
4 of the fraud and Defendant’s threats of both criminal fraud and civil litigation, Premier Cru then
5 delivered Defendant very valuable wines. The Motion seeks the avoidance and recovery of the
6 value of the wines shipped to Defendant after Defendant learned of the fraudulent scheme and
7 threatened Premier Cru. The value of wines transferred after that time totals \$153,586.84, as set
8 forth in detail on Exhibit “17” attached to the Declaration of Brian Nishi (the “Wine Transfers”).
9 The values are the amounts that Premier Cru paid to purchase those wines on the open market. The
10 Wine Transfers to Defendant were part of a fraudulent scheme run by Premier Cru involving the
11 loss of tens of millions of dollars. The Trustee now seeks to avoid these fraudulent transfers so that
12 the value can be reclaimed for the benefit of Premier Cru’s creditors through this Motion for Partial
13 Summary Judgment on the First and Second Claims for Relief to avoid the Wine Transfers on an
14 actual fraudulent intent theory.¹

15 **A. Factual Background**

16 1. The Trustee is the duly appointed Chapter 7 trustee for the bankruptcy estate of
17 Premier Cru. On January 8, 2016, Premier Cru entered bankruptcy proceedings (the “Petition
18 Date”), at which time the Trustee was appointed by the Court.

19 2. In 1980, John Fox (“Fox”) co-founded Premier Cru with Hector Ortega (“Ortega”)
20 in Oakland, California. *See* Request for Judicial Notice in Support of Motion for Partial Summary
21 Judgment (“RJN”), Ex. 1 (Plea Agreement), at p. 2. Ortega, did not actively participate in running
22 the business. *See id.*, Ex. 1, at p. 3. Fox served as Premier Cru’s President and on his own, made all
23 significant business decisions. Specifically, Fox: (1) hired all the employees; (2) managed the
24 finances of the company, including the payment of Premier Cru’s bills and expenses; (3) managed
25

26
27 ¹ The Trustee reserves the right to seek subsequent relief on the remaining Claims for Relief,
28 including seeking summary judgment on other transfers of wine and cash on an actual fraudulent
transfer theory or a constructive fraudulent transfer theory as to all transfers.

1 obtaining business loans and other financing from banks or individuals to fund Premier Cru's
2 business. *See Plea Agreement*, at p. 3.

3 3. Premier Cru was in the business of selling wine (*see Declaration of Kathy Bazoian*
4 Phelps ("Phelps Decl."), Ex. 5 (Defendant's Responses to Plaintiff's Requests for Admissions
5 ("Defendant's RFA"), at No. 20) and generally sold wine in two ways. *See Plea Agreement*, at p. 2.
6 First, Premier Cru had a physical retail store where customers could purchase wine that was
7 physically in stock. *See id.* Second, Premier Cru sold wine for which it did not yet physically have
8 possession. *See id.* This wine was referred to as "pre-arrival" wine or "wine futures." *Id.*

9 4. Premier Cru sold pre-arrival wine through a website operated and maintained by
10 Premier Cru or through salespeople who worked in the Premier Cru offices and reported directly to
11 Fox. *See Plea Agreement*, at pp. 2-3. The "Terms and Conditions" associated with the sale of pre-
12 arrival wine provided as follows:

13 The term "Pre-Arrival" is applied to wines we have purchased (typically abroad)
14 that have not arrived yet. Depending on the particular wine, the arrival time is
15 typically 6+ months to over two years (in the case of Bordeaux Futures, for
16 example).

17 Many new releases of highly desirable, limited-production wines (ie – Burgundy,
18 Rhone, Italian, etc.) are offered on a "Pre-Arrival" basis by our suppliers. These
19 offerings typically take 6 to 18 months to arrive and are often the only way to
20 source the wines before they sell out (and at optimal prices). We send an email
21 notification when your wine arrives.

22 *See Declaration of Brian Nishi ("Nishi Decl."), at ¶ 6.* The majority of Premier Cru's revenue was
23 derived from pre-arrival sales. *See Plea Agreement*, at p. 3.

24 **B. Premier Cru Was a Fraudulent Scheme Orchestrated by John Fox.**

25 5. On or about August 11, 2016, Fox entered into a guilty plea in his criminal case
26 [*United States v. John Fox*, Case No. CR 16-281 JD, N.D. Cal] and executed the Plea Agreement in
27 which he admitted that he operated Premier Cru as a fraudulent scheme. *See generally Plea*
28 *Agreement.* In his Plea Agreement, Fox admitted that through Premier Cru's sale of pre-arrival
29 wine, he "devised a scheme to defraud, and a scheme for obtaining property by means of false and

1 fraudulent pretenses, representations and omissions, through Premier Cru's sale of pre-arrival
2 wine." Plea Agreement, at p. 3.

3 6. In particular, Premier Cru's pre-arrival wine business was based on the premise that
4 Premier Cru would contract to buy wine from Europe and would then sell the wine to its customers
5 through Premier Cru's website and salespeople. *See id.*, at p. 3.

6 7. Premier Cru either directly or indirectly represented to customers that the pre-arrival
7 wines that were listed on Premier Cru's website, contained in Fox's email messages to customers,
8 or sold by salespeople in Premier Cru's offices were wines that Premier Cru had actually already
9 purchased. *See Plea Agreement*, at p. 3. Premier Cru also represented to customers, through its
10 website as well as other sources, that Premier Cru would deliver these wines to customers within a
11 time period of approximately six months to two years after customers had paid for the wine. *See id.*

12 8. These representations were false and driven by Fox, who knew that they were false
13 at the time that he made them or caused his salespeople to make. Instead, Fox knew that he could
14 not or would not obtain many of the pre-arrival wines sold by Premier Cru largely for two reasons
15 in which he failed to inform his customers, lenders, and employees. *See id.*

16 9. First, Fox falsified purchase orders for wine that he had not contracted to purchase
17 and entered them into Premier Cru's inventory for sale. *See id.* Fox first began creating fraudulent
18 purchase orders for pre-arrival wine in approximately 1993 or 1994. The percentage of the
19 purchase orders entered for pre-arrival wine that were entirely or partially fraudulent increased over
20 time, such that by 2010, it constituted a significant portion of the business. *See Plea Agreement*, at
21 p. 6. These falsified purchase orders took two forms – either purchase orders that were entirely
22 false, wherein Fox had contracted to purchase the wine but fraudulently increased the number of
23 bottles covered by the contract. *See id.* Fox deliberately priced these wines at prices below the
24 market price knowing that he had not and would not need to actually pay for this from any vendors.
25 *See Plea Agreement*, at pp. 3-4. Once entered into Premier Cru's inventory system, these wines
26 became available for sale on Premier Cru's website, were advertised through email, or could be
27 sold by salespeople in Premier Cru's offices. *See Plea Agreement*, at p. 3.

1 10. Based on Fox's misrepresentations, customers paid Premier Cru to purchase wines
2 believing that Premier Cru had actually purchased them and would eventually deliver them. *See id.*,
3 at p. 4. Fox admitted in his Plea Agreement that he attempted to sell approximately \$ 20 million
4 worth of such falsified wine through Premier Cru from 2010 to 2015. *See id.* at p. 4. The Debtor's
5 records reflect that the amount of altered or falsified wine transactions was significantly higher in
6 this time period. *See* Nishi Decl., at ¶ 7.

7 11. Second, in other instances, Fox actually did contract with Premier Cru's foreign
8 suppliers on behalf of Premier Cru to purchase wine, generally with the promise to pay those
9 foreign suppliers within 30 days. *See Plea Agreement*, at p. 4. In many of these instances, Fox
10 knew that Premier Cru would not be able to payment within 30 days, or ever, because Fox had (1)
11 embezzled funds from Premier Cru's business accounts that Fox should have used to pay Premier
12 Cru's suppliers and (2) "**diverted money coming in from current customers to obtain wine for**
13 **prior customers who had never received their wine.**" *Id.* (emphasis added). In other words,
14 Premier Cru was a Ponzi scheme orchestrated by Fox.

15 12. Fox embezzled Premier Cru's business accounts and American Express card to pay
16 various personal expenses such as his wife's personal credit card and the purchase and leasing of
17 expensive cars, in addition to his salary and partner draw. *See Plea Agreement*, at p. 4.

18 13. Fox knew at the time that he embezzled these funds that they made it impossible for
19 Premier Cru to fulfill all its obligations to deliver wine to customers and to purchase wines from its
20 suppliers, yet he continued to sell wine to customers knowing the falsehood of his representations
21 about whether and when the wine would be delivered. *See id.*

22 14. The diversion of funds to purchase wine for prior customers overtime led to many
23 customers complaining to Premier Cru about not receiving the wine for which they had paid. *See*
24 *id.*, at p. 4. Fox directly or indirectly lied to these customers offering various falsified excuses and
25 promises for wine that he knew was not going to be delivered. *See id.*, at pp. 4-5. Fox also
26 instructed his salespeople or other employees to tell customers things Fox knew were false. *See*
27 Plea Agreement, at p. 5.

1 15. When customers complained repeatedly or forcefully, Fox arranged to deliver wine
2 to them, even if he had not previously purchased or acquired the wine for which they had paid. *See*
3 *id.* He often did this by delivering to those customers wine for which other customers had paid or,
4 in many cases, by purchasing the wine from other suppliers, usually at prices much higher than
5 those for which he had sold the wine in the first place. *See id.* In fact, a substantial amount of
6 money in Premier Cru's bank accounts went to purchase wine in this manner. *See id.*

7 16. Fox took these and other actions to conceal his ongoing fraud to lull customers into
8 a false sense that Premier Cru was a legitimate business, to cause these customers to continue to
9 purchase wine from Premier Cru, and to prevent them from complaining to law enforcement
10 authorities. *See* Plea Agreement, at p. 5. Fox also concealed all of the above from Premier Cru's
11 lenders, by falsifying Premier Cru's financial records, and the lenders extended credit to Premier
12 Cru as a result of misrepresentations Fox made and the falsified records he created. *See id.*

13 **C. Frustrated and Skeptical Customers Publicly Criticized the Company and
14 In Some Instances, Sought Legal Action Against Premier Cru and John Fox.**

15 17. Long before Defendant was himself calling this a Ponzi scheme, many of Premier
16 Cru's customers had publicly become frustrated, unpersuaded, and dissatisfied with Fox's constant
17 excuses for delay and promises of delivery and themselves had openly referred to Premier Cru as a
18 fraud and a Ponzi scheme. Several customers realized that they were not alone with the incessant
19 delays and excuses by learning of other customers' exact situations directly from them or by
20 reading on-line forums, such as Yelp and Wine Spectator. By way of example, one customer wrote:
21 “[i]t's not just the reviews [on Yelp] and at other forums (Wine Spectator, for instance), I have
22 personally heard from 2 independent wine merchants with the exact same problem with Premier
23 Cru, so my experience is not an isolated incidence [sic].” *See* RJD, Ex. 3 (printout of Yelp reviews
24 of “Premier Cru Fine Wines”), at p. 3.

25 18. Customers shared their disbelief and skepticism with the company's “nonsensical”
26 excuses or “stories” regarding delayed deliveries and warned others about ordering “wine futures.”
27 One customer on September 20, 2010, advised: “Careful ordering anything they do not have in
28 stock. They will tell you various nonsensical stories about where wine is for months and you can

1 wait over a year for future. The next year's vintage will already be in wine stores all around the
2 country and they will still not have fulfilled your order for the last year . . . They will keep and use
3 your money for over one year." *See* RJN, Ex. 4 (printout of Yelp reviews of "Premier Cru Fine
4 Wines"), at p. 5. Another customer on April 6, 2012 warned: "DON'T BUY WINE FUTURES
5 FROM PREMIER CRU!!!!!! These folks simply take your money then dump you . . . Today I
6 cannot get them to ship any of the 2005, 2006, 2007 or 2008 wine futures ordered and paid for as
7 much as six years ago. Other retailers long since delivered their orders. Premier Cru makes up
8 stories, promises to ship, then doesn't[.]" *See* RJN, Ex. 4, at p. 8.

9 19. Some customers even experienced delay in receiving refunds after canceling their
10 order. On December 16, 2011, one customer complained: "They said they couldn't credit me but
11 would send a check within the week. The check didn't come." *See id.*, Ex. 4, at p. 4.

12 20. Many customers even considered Premier Cru's a fraudulent scheme and in fact, a
13 Ponzi scheme. One customer on April 20, 2013, claimed: "NOWHERE was there ANY apology for
14 this trip down a "wine Ponzi." *See id.*, Ex. 3, at p. 4. On August 3, 2013, another customer claimed
15 that Premier Cru "should be reported" and it was "like a wine Ponzi Scheme." *See id.*, Ex. 3, at p.
16 5. Two months later, one customer wrote on November 10, 2013:

17 They lie about everything. They have no shame to make promises that; it is always
18 someone else fault and we will get our wines next month. And this goes on month
19 after month after month after month. They are shameless people who I think are
20 running a Ponzi scheme, living on other peoples money. . . I learned a lot about how
they operate during this time, the reason the prices they offer are lower is they are
doing some sort of Ponzi scheme . . .

21 *See* Ex. 3, at p. 6. One customer advised on April 15, 2014: "**DO NOT ORDER WINE FROM**
THIS ESTABLISHMENT!!!!!! THEY ARE CROOKS!!!" *See* Ex. 3, at p. 8 (emphasis added).

22 21. Eventually several customers considered legal action. As one customer wrote on
23 October 11, 2013, "[t]his is by far the biggest pyramid scam you can imagine . . . I am currently
24 weighing my legal options. *See* Ex. 3, at p. 6. In fact, at least five customers filed lawsuits against
25 Premier Cru, as early as December 2014, for, among other things, **fraud, conversion, unfair**
business practices in connection with their promised and paid for wines. *See* Exhibit 2 (Five Filed
26
27
28

1 Complaints against Premier Cru in the Northern District of California and Superior Court of
2 California, Alameda County (emphasis added)).

3 **D. Premier Cru Was In a Precarious Financial Condition at the Time of the
4 Wine Transfers.**

5 22. At the time of Premier Cru's bankruptcy, approximately 4,500 customers had not
6 received pre-arrival wine for which they had paid. *See Plea Agreement*, at p. 6. These individuals
7 were victims of Fox's scheme in which he operated through Premier Cru. *See id.* Furthermore, at
8 the time of Premier Cru's bankruptcy, customers had paid at least approximately \$45 million for
9 wines that they had not received. *See id.* But Premier Cru experienced financial concerns *well*
10 *before* the Petition Date.

11 23. Fox's own admissions illustrate Premier Cru's precarious financial condition,
12 including (a) Premier Cru not being able to pay foreign suppliers within 30 days, *or ever* (*see Plea*
13 *Agreement*, at p. 4 (emphasis added)); (b) the embezzlement of funds that made it *impossible* for
14 Premier Cru to fulfill all its obligations to customers and obtain the wines it had actually contracted
15 to purchase (*see id.* (emphasis added)); and (c) a substantial amount of money in Premier Cru's
16 bank accounts used to purchase what appears to be hush wine at higher prices for disgruntled
17 customers who had already paid (*see id.*, at p. 5).

18 24. Premier Cru presently has one or more creditors whose claim arose either before or
19 after the transfers to the Defendant. *See Claims Register*, Case No. 16-40050-WJL (2,354 claims
20 filed against the estate) and Claim No. 467-1 (example of an existing and unsecured creditor).

21 **E. Defendant Is Sophisticated, Was Aware of Premier Cru's Inability to Deliver
22 Promised Wines and Is Not Entitled to a Good Faith Defense.**

23 25. The Wine Transfers to Defendant were transfers made as part of Premier Cru's
24 fraudulent scheme. Defendant Nicholson had a longstanding business with Premier Cru since 1986.
25 Phelps Decl., Ex. 6 (Email from Nicholson to Michael Glasby, dated March 28, 2013), at
26 Nicholson000015. As set forth below, that relationship took a significant turn for the worse in 2013
27 when Defendant could not get his wines from Premier Cru, and he became convinced of a fraud.

1 26. It is undisputed that Premier Cru made transfers of property of the Debtor to the
2 Defendant over the course of the fraudulent scheme, and after a point in time when Defendant
3 knew that Premier Cru was running a fraud. This Motion is limited to the transfers made to
4 Defendant after that point in time. *See* Nishi Decl., Ex. 17.

5 27. Defendant has extensive knowledge and experience with wines, including
6 purchasing and collecting wines from Premier Cru and other wine sellers. By way of example,
7 Defendant (a) maintains or maintained a wine cellar (Phelps Decl., Ex. 7 (Email from Nicholson to
8 Premier Cru representative, dated January 17, 2011 at Nicholson000003); (b) possesses or
9 possessed highly desirable wines (*see id.*, Ex. 5 (Defendant's RFA), at No. 10 (Defendant admits
10 that first growth Bordeaux wines and several other wines purchased from Premier Cru are
11 "considerably highly desirable wines by wine collectors."); (c) understands the value of original
12 wooden cases ("OWCs") and thus, demands that they are included with his the shipment of his
13 wines (*see id.* Ex.8 (Email from Nicholson to Premier Cru representative, dated November 15,
14 2010) ("Please make sure you shipping dept. includes the OWC's.") at Nicholson000001) and Ex 9
15 (Email from Nicholson to Premier Cru, dated April 10, 2011) at Nicholson000007 ("[A]ny change
16 you still have the OWC they came in? Will pay to ship if so, please advise.")); and (e) read or reads
17 wine "blogs" or websites by critics (*see id.*, Ex. 10 (Email from Nicholson to Premier Cru
18 representative, dated April 11, 2011) at Nicholson000010 ("Just FYI, here is the thread from Jancis
19 Robinson detailing her daily progress through the *primeurs*." (emphasis included)).

20 28. By August 2013, Defendant was well aware of issues with Premier Cru. As set forth
21 below, Premier Cru was not delivering, and had not delivered wines to him within the period he
22 expected the wines would be delivered. *See* Phelps Decl., Ex. 5 (Defendant's RFA), at No. 11.
23 Additionally, the public record was replete with allegations of fraud and Ponzi scheme with respect
24 to Premier Cru when Defendant received the Wine Transfers after Defendant himself had labeled it
25 a Ponzi scheme in August 2013.

26 29. As early as February 2011, Defendant began experiencing delayed (over a month)
27 responses from Premier Cru regarding inquiries: "Still never had any response to this issue, you
28

1 were going to check with one of the owners and get back to me...." See Phelps Decl., Ex. 13
2 (Email from Nicholson to Michael Glasby, dated February 24, 2011) at Nicholson000005.

3 30. Defendant emailed Michaela Glasby, a Premier Cru employee, on May 28, 2013,
4 regarding his frustration and knowledge of Premier Cru's false statements:

5 I'm sure you can understand this. I truly wish the firm would clean up its act, and
6 not subject customers like me to the extreme stress, anxiety and aggravation that
7 these utterly unacceptable, unprofessional, inexcusable and **deceitful practices** that
ensnared me into these future purchases have caused.

8 I am already dealing with a lot of stress and responsibilities elsewhere in my
9 professional life, and I truly did not need this betrayal of trust and the additional
10 mental anguish. I had trusted Premier Cru, due to longstanding business going back
11 to 1986. Yours was the last firm I would have expected to have these futures
12 problems with, which explains why the bulk of my 2009 Bordeaux purchases were
13 with you. **To be essentially be defrauded into parting with hundreds of**
thousands of dollars, under false pretenses that your firm had already purchased
and owned these wines, is a position that I am absolutely not enjoying being in, and
I look for this utter nightmare to end.

14 See Phelps Decl., Ex. 6 (Email from Nicholson to Michael Glasby, dated March 28, 2013) at
15 Nicholson000014 - 000015 (emphasis added).

16 31. Defendant expressed similar frustrations to one of Premier Cru's representatives:
17 "I'm getting very tired, extremely tired in fact, of having to repeatedly call or email your outfit."
18 Phelps Decl., Ex. 14 (Email from Nicholson to Premier Cru representative, Michael Glasby, dated
19 June 26, 2013) at Nicholson000017.

20 32. A delay with Defendant's refund even led him to question Premier Cru's cash needs,
21 since the company appeared "desperate for funds": "And what now, you believe that if you just
22 ignore me, I'll go away? The credit has STILL not appeared on my bank statement. What, is
23 Premier Cru so desperate for funds they are hesitate to process a refund?" Phelps Decl., Ex. 14
24 (Email from Nicholson to Michael Glasby, dated June 26, 2013) at Nicholson000017.

25 33. For Defendant, store credit was not an option: "This is the last time I will ask
26 politely for the refund. Again, no, I do NOT want 'store credit.' Given the appallingly sleazy
27 conditions surrounding the monies your outfit already owes me, to suggest I should add to that yet

1 additional debt I'm due is rather absurd, don't you think?" Phelps Decl., Ex. 14 (Email from
2 Nicholson to Michael Glasby, dated June 26, 2013) at Nicholson000017.

3 34. Defendant threatened to sue Premier Cru for failure to deliver wines in August of 2013
4 (see Phelps Decl., Ex. 5 (Defendant's RFA), at No. 3) by sending an email to Fox and another
5 Premier Cru representative on August 15, 2013 with subject a line: "**WARNING: LAWSUIT**
6 **AND CRIMINAL FRAUD CHARGES PENDING.**" See Phelps Decl., Ex. 5 (Defendant's RFA),
7 at No. 4)(emphasis added). Defendant unequivocally (a) called Premier Cru a "**PONZI SCHEME**"
8 and (b) promised to file a civil suit for "**FRAUD**" and press "**CRIMINAL CHARGES**" against
9 Fox (and his staff)," if Premier Cru did not make Defendant "**WHOLE**" relative to the amounts
10 previously paid to it by him. See Phelps Decl., Ex. 15 (Email from Nicholson to Fox and Glasby,
11 dated August 15, 2013) at Nicholson000018) (emphasis added); Ex. 5 (Defendant's RFA), at No. 4.

12 35. When Fox failed to ship the OWC's with Defendant's last shipment, Defendant did
13 not believe that the OWCs existed for the bottles and that Fox was delaying to buy more time to
14 "scrounge" them up:

15 It is additionally disturbing to get this info that somewhere you have the OWC's but
16 didn't ship. This makes absolutely no sense . . . and the logic to withhold shipment
17 till next week is inexplicable to anyone with any experience at all in buying wine. It
instead seems clear the OWC's for these bottles don't exist, and you're scrounging
some up in the meantime.

18 See Phelps Decl., Ex. 12 (Email from Nicholson to Fox, dated October 15, 2013) at
19 Nicholson000047.

20 36. More delay prompted Defendant to send another email on October 29, 2013,
21 inquiring the status of his wines: "John [Fox], where is the rest of my stuff? Below, on Oct. 11, you
22 said they would be here around Oct. 18 . . . Please let me know when I will have in my possession
23 the rest of my outstanding with you." Ex. 11 (Email from Nicholson to Fox) at Nicholson000081.

24 37. Defendant **knew** that other customers were also experiencing delay with the
25 shipment of their wines. In fact, Defendant emailed Premier Cru, on behalf of a "very, very good
26 friend," demanding that his friend's wines be shipped immediately to him: "Stewart McSherry in
27 Los Angeles also needs to have ****ALL**** of the rest of his stuff with you shipped to him

1 immediately, if not sooner" and that his friend had accepted the "baloney false reassurances for so
2 very long" of one Premier Cru's representatives. Phelps Decl., Ex. 16 (Email from Nicholson to
3 Fox, dated January 10, 2014) at Nicholson000111. Defendant also advised Fox "[n]o more games,
4 no more string-alongs, no more excuses" and that Defendant, was "no so nice, not by any stretch of
5 the imagination" and that "there's no point taking [Premier Cru] staff's entreaties to be 'patient',
6 because [Defendant was] fully aware [] that [Premier Cru would] only take advantage of it." .
7 Phelps Decl., Ex. 16 (Email from Nicholson to Fox, dated January 10, 2014) at Nicholson000111.

8 38. It was imperative for Defendant that he received all his wines, despite glaring "red
9 flags," so that he was no longer "exposed" to Premier Cru. *See* Phelps Decl., Ex. 12 (Email from
10 Nicholson to Fox, dated August 26, 2013) at Nicholson000050 ("Understandably, I need to get out
11 of this exposure position as soon as possible.") and *id.* (Email from Nicholson to Fox, dated
12 October 15, 2013) at Nicholson000047 ("Since I am exposed to your firm . . .").

13 39. As set forth in detail herein, Defendant could have and should have discovered the
14 complaints and other public postings about Premier Cru's financial problems and the allegations of
15 fraud long before the Wine Transfers were made.

16 **II. LEGAL STANDARD**

17 Under Rule 56 of the Federal Rules of Civil Procedure, made applicable in this adversary
18 proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment shall
19 be granted when there is no genuine issue of material fact and the moving party is entitled to
20 judgment as a matter of law. Fed. Rule Civ. Proc. 56. A party seeking summary judgment must first
21 establish by reference to the pleadings, judicially noticed matters, or discovery responses that there
22 are no genuine disputes concerning the material facts upon which a claim or defense lies, and that
23 the moving party is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56(c). If the
24 movant makes the showing, the burden shifts to the respondent to come forward with evidence, in
25 specific and admissible form, to demonstrate that a triable issue exists. Fed. Rule Civ. Proc. 56(e).

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III. LEGAL ARGUMENT

A. The Wine Transfers Were Actual Fraudulent Transfers Under Bankruptcy Code Section 548(a)(1)(A) and California Civil Code Section 3439.04(a).

The Trustee seeks the avoidance and recovery of the Wine Transfers under 11 U.S.C. §§ 544, 548, 550 and California Civil Code § 3439.04. “Under both the [C]UFTA and Bankruptcy Code § 548, the trustee has the burden of proving the elements of a fraudulent transfer by a preponderance of the evidence.” *Brandt v. nVidia Corporation (In re 3DFX Internative, Inc.)*, 389 B.R. 842, 863-64 (2008).

Section 548 provides, in relevant part, that a trustee may avoid any transfer of an interest of the debtor in property that was made on or within two years before the date of the filing of the bankruptcy petition as an actual fraudulent transfer. 11 U.S.C. § 548(a)(1)(A). To avoid transfers outside this two year time period, § 544(b) of the Bankruptcy Code permits a bankruptcy trustee to avoid any transfer of a debtor's property that would be avoidable by an unsecured creditor under applicable state law. *See In re Acequia, Inc.*, 34 F.3d 800, 809 (9th Cir. 1994). One creditor of any amount will suffice for the purposes of § 544(b). *Id.* at 809-10. California's fraudulent transfer statutes are similar in form and substance to the Bankruptcy Code. *In re United Energy Corp.*, 944 F.2d 589, 594 (9th Cir. 1991). *Compare* 11 U.S.C. § 548(a)(1) with Cal. Civ. Code § 3439.04(a) (allowing a transfer to be avoided when the debtor acted with "actual intent to hinder, delay, or defraud" an entity or creditor, or where indicia of constructive fraud are present). Section 3439.04 extends the avoidance provides a reach back of seven (7) years prior to the Petition Date.

To prevail on an actual fraudulent transfer claim under both Bankruptcy Code and California's equivalent statute, a trustee must show that the debtor made a transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted. *See* 11 U.S.C. § 548(a)(1)(A) and § 3439.04(a).

Here, as Fox noted in his Plea Agreement, at least one unsecured creditor (i.e., foreign suppliers and customers) exists allowing for the Wine Transfers made by the Debtor to Defendant within seven years before the Petition Date avoidable under Sections 3439.04(a) and 3439.08(a). *See Plea Agreement*, at pp. 4 and 6; *see also* Claim No. 467-1. As demonstrated below, the Trustee

1 has met the requisite elements for avoiding the Wine Transfers as actual fraudulent transfers under
2 the Bankruptcy Code (for transfers within two years and California's UFTA for all of the transfers).

3 **B. The Elements of Actual Fraudulent Transfer Have Been Satisfied**

4 **1. The Wine Transfers Were Transfers of the Debtor's Property to
5 Defendant.**

6 It is undisputed that Premier Cru made transfers of property of the Debtor to the Defendant
7 over the course of the fraudulent scheme. Specifically, Premier Cru made the Wine Transfers set
8 forth in Exhibit "17." *See Answer*, at ¶ 25 and 36.

9 A "transfer" under the Bankruptcy Code is defined as "each mode, direct or indirect,
10 absolute or conditional, voluntary or involuntary, of disposing of or parting with – (i) - property; or
11 (ii) an interest in property. 11 U.S.C. § 54(D). California's definition of a "transfer" is nearly the
12 same. *Compare with* Cal. Civ. Code § 3439.03(m) (a "transfer" is "every mode, direct or indirect,
13 absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an
14 interest in an asset, and includes payment of money[.]").

15 As for the timing of a transfer, § 548(d) provides that "a transfer is made when such transfer
16 is so perfected that a bona fide purchaser from the debtor against whom applicable law permits
17 such transfer to be perfected cannot acquire an interest in the property transferred that is superior to
18 the interest in such property of the transferee." Similarly, the CUVTA provides that: "A transfer is
19 made . . . with respect to an asset that is not real property or that is a fixture, when the transfer is so
20 far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under
21 this chapter that is superior to the interest of the transferee." Cal. Civ. Code § 3439.06(a).

22 Here, the date of the "transfer" is the shipping date, when the bottle of wine was both
23 identifiable and in existence. "Goods must be both existing and identified before any interest in
24 them can pass." Cal. Comm. Code § 2105(2). Importantly, "identification" under the UCC can
25 occur only "when goods are shipped, marked or otherwise designated by the seller as goods to
26 which the contract refers." Cal. Comm. Code § 2501(1)(b). The wines transferred were not in
27 existence or in the Debtor's control when the Defendant made payment (as is indicated by the
28 Debtor's extensive delays and excuses in delivering wines to Defendant), so title could not and did

1 not pass until the wines were acquired by the Debtor and shipped to Defendant. Fox fraudulently
2 represented that Premier Cru had already purchased the pre-arrival wines when he took money
3 from Defendant and other customers. See Plea Agreement, at pp. 3-4. These wines were neither “in
4 existence” nor could they be “identified” for purposes of the UCC at the time Defendant provided
5 payment to Premier Cru because the entire transaction was a sham. Rather, these wines were “both
6 existing and identified” only when Premier Cru acquired the wines and they were actually shipped
7 to Defendant.

2. The Transfers Were Made With Actual Intent to Hinder, Delay, or Defraud Creditors.

The inquiry is the same under § 548(a)(1) of the Bankruptcy Code and § 3439.04(a) of California’s Civil Code in determining that Fox’s sales were actually fraudulent as having been made *with actual intent* either to hinder or to delay or to defraud creditors. *See Cohen v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709, 716 (B.A.P. 9th Cir. 1996) (referencing 11 U.S.C. § 548(a)(1) and Cal. Civ. Code § 3439.04(a)). “The focus in the inquiry into actual intent is on the state of mind of the debtor. Neither malice nor insolvency are required.” (*Cohen*, at 716-17). “Actual intent” is found by the existence of a Ponzi scheme or a confluence of “badges of fraud.”

a) **The Ponzi scheme Presumption Applies.**

17 The Ninth Circuit has consistently held that the mere existence of a Ponzi scheme is
18 sufficient to establish the actual intent to hinder, delay, or defraud creditors under 11 U.S.C. §
19 548(a) and California Civil Code § 3439.04(a), or another state's equivalent fraudulent transfer
20 statute. *See, e.g., Slatkin v. Neilson (In re Slatkin)*, 525 F.3d 805, 814 (9th Cir. 2008) (examining 11
21 U.S.C. § 548(a) and Cal. Civ.Code § 3439.04(a)); *Barclay v. MacKenzie (In re AFI Holding, Inc.)*,
22 525 F.3d 700, 703, 2008 WL 1734583, at *3 (9th Cir. April 16, 2008); *Hayes v. Palm Seedlings*
23 *Partners–A (In re Agric. Research & Tech. Group, Inc.)*, 916 F.2d 528, 534–35 (9th Cir.1990);
24 *Plotkin v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709, 717 (9th Cir. BAP 1996).

25 Courts frequently rely on a guilty plea or plea agreement to find the existence of fraudulent
26 intent and Ponzi scheme. *E.g., AFI Holding*, 525 F.3d at 704 (Defendant’s “plea demonstrates the
27 existence of fraudulent intent and a Ponzi scheme”); *In re Singh*, 2015 WL 1887939, at *12 (Bankr.

1 E.D. Cal. Apr. 22, 2015) (“[B]ased on the debtor's guilty plea and plea agreement[,] the court finds
2 there is conclusive evidence that the debtor was operating a Ponzi scheme.”). In fact, the Ninth
3 Circuit court in *Slatkin* specifically held “a debtor's admission, through guilty pleas and a plea
4 agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with
5 the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent” and
6 “precludes relitigation of that issue.” *Slatkin*, 525 F.3d at 814. The *Slatkin* court held that the plea
7 agreement is admissible under Federal Rule of Evidence 807 in granting summary judgment.
8 *Slatkin*. *Id.* at 812.

9 Here, there is no genuine issue of material fact that Fox’s guilty plea, which is admissible
10 under Rule 807 of the Federal Rules of Evidence, clearly demonstrates the existence of fraudulent
11 intent and a Ponzi scheme. Specifically, Fox admitted that he (1) “devised a scheme to defraud, and
12 a scheme for obtaining property by means of false and fraudulent pretenses, representations and
13 omissions, through Premier Cru’s sale of pre-arrival wine” and (2) “diverted money coming in
14 from current customers to obtain wine for prior customers who had never received their wine.” Plea
15 Agreement, at pp. 3-4.

16 Premier Cru's scheme meets the definition of a Ponzi scheme. The flow of funds in Premier
17 Cru's scheme for which Fox was sent to prison bore the hallmark signs of a Ponzi scheme – i.e., the
18 funds paid by later customers of the debtor are used to pay promised dividends to earlier customers.
19 Although Premier Cru sold wine and was not an investment program, “[c]ase law has revealed that
20 a clever twist on the Ponzi concept will not remove a fraudulent scheme from the definition of
21 Ponzi.”² The mere fact that the alleged business in question involved the sale of physical goods

²³ *Forman v. Salzano (In re Norvergence, Inc.)*, 405 B.R. 709, 730 (Bankr. D. N.J. 2009; *In re Dreier LLP*, 2014 WL 47774, at *9 (S.D.N.Y. Jan. 3, 2014) (“At bottom, the label Ponzi scheme applies to any sort of inherently fraudulent arrangement under which the debtor-transferor must utilize after-acquired investment funds to pay off previous investors in order to forestall disclosure of the fraud.”) (internal quotations omitted); *Auza v. United Development, Inc.*, 319 Fed. App’x 685 (9th Cir. 2009) (affirming the bankruptcy court’s finding that the debtor operated a Ponzi scheme where the debtor “made payments to lenders from money obtained from later lenders, rather than from business profits.”); *In Armstrong v. Collins*, 2010 WL 1141158, * 23 (S.D.N.Y. 2010) (citing *Norvergence, Inc.*, 405 B.R. at 730) (addressing this same argument, noting that “even assuming

1 does not preclude applying the label of a Ponzi scheme. The label of “Ponzi scheme” is also not the
2 only method in which a debtor can defraud its creditors. As a result, courts have found actual intent
3 in instances where the underlying fraud was not labelled as a Ponzi scheme.³ One court specifically
4 addressing the issue stated the following:

5 Though the Fifth Circuit cases considered fraudulent organizations deemed “Ponzi
6 schemes,” this Court makes no findings regarding when and if the Interamericas
7 Companies became a Ponzi scheme. The Fifth Circuit’s reasoning applies whether
8 the organization neatly fits within a judicially constructed definition of a Ponzi
9 scheme or was a fraudulent scheme that had some, but perhaps not all, attributes of
10 the traditional Ponzi scheme. When an organization perpetuating a fraud makes a
11 transfer necessary for continuation of the fraud, the transfer is made with the actual
12 intent to defraud.

13 *In re IFS Fin. Corp.*, 417 B.R.419, 439 n. 15 (Bkrtcy.S.D.Tex. 2009) (emphasis added)

14 Moreover, the logic of the Ponzi scheme presumption and resulting finding of intent to
15 defraud applies with equal force to the fraud orchestrated by Fox. As one oft cited court stated:

16 One can infer an intent to defraud future undertakers from the mere fact that a debtor
17 was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A
18 Ponzi *Merrill* scheme cannot work forever. The investor pool is a limited resource
19 and will eventually run dry. The perpetrator must know that the scheme will
eventually collapse as a result of the inability to attract new investors. The
perpetrator nevertheless makes payments to present investors, which, by definition,
are meant to attract new investors. He must know all along, from the very nature of
his activities, that investors at the end of the line will lose their money. Knowledge
to a substantial certainty constitutes intent in the eyes of the law, . . . and a debtor's
knowledge that future investors will not be paid is sufficient to establish his actual
intent to defraud them.

20 *Merrill v. Abbott (In re Independ. Clearing House, Co.)*, 77 B.R. 843, 861 (D. Utah 1987) (emphasis
21 added); *In re Slatkin*, 310 B.R. 740, 748-49 (C.D. Cal. 2004).⁴

22 [the fraudster] did not premise or represent high rates of return, this does not mean that he was not
23 running a Ponzi scheme.”).

24 ³ See e.g., *In re National Audit Defense Network*, 367 B.R. 207, 219-22 (Bankr. D. Nev. 2007)
25 (finding actual intent to defraud even where trustee’s expert stated the debtor “was not a Ponzi
scheme”); see also *Agric. Research*, 916 F.2d at 535-36 (9th Cir. 1990) (“knowledge that a
transaction will operate to the detriment of creditors is sufficient for actual intent.”) (quoting *In re
Am. Prop. Inc.*, 14 B.R. 637, 643 (Bankr. D. Kan. 1981)).

26 ⁴ The Ponzi scheme presumption also permits a presumption of insolvency during the time in which
27 the Ponzi scheme was operating. *Donell v. Kowell*, 533 F.3d at 770-71 (9th Cir. 2008)
28 (presumption that that a debtor who is running a Ponzi scheme is insolvent).

1 In this present case, Fox's scheme involved a bargain price up front for wine for which
2 there was a one-time return in the form of delivery of the wine, which was purchased by Premier
3 Cru with funds of subsequent customers. Fox's Plea Agreement is sufficient to establish his
4 knowledge that future wine sales to Premier Cru's customers would necessarily go unfulfilled.
5 More specifically, Fox knew that he would be unable to make required payment to his suppliers or
6 to deliver wines to customers and thereby satisfy Premier Cru's obligations "because (1) [he]
7 embezzled money from Premier Cru's business accounts that [he] should of used to pay Premier
8 Cru's suppliers or (2) [he] diverted money coming in from current customers to obtain wine for
9 prior customers who had never received their wine." Plea Agreement at p. 4. Whether termed as a
10 Ponzi scheme or some other form of fraud, the Plea Agreement conclusively establishes that
11 Premier Cru made the identified transfers *with the actual intent* to hinder, delay, or defraud its
12 creditors.

b) Undisputed Facts Establish a Confluence of Badges of Fraud

14 Even if the undisputed facts regarding the fraud were somehow insufficient to establish
15 intent on the basis of a Ponzi scheme presumption, there are numerous badges of fraud sufficient to
16 establish fraudulent intent. It is well settled that “[b]ecause direct evidence of intent is rare, courts
17 tend to infer the existence of an intentional fraudulent transfer from the circumstances surrounding
18 the transfer.” *In re Pringle*, 495 B.R. 447 (9th Cir. B.A.P. 2013); *Ezra v. Seror (In re Ezra)*, 537
19 B.R. 924, 930 (B.A.P. 9th Cir. 2015). To facilitate this process, California’s UFTA enumerates
20 eleven non-exclusive “badges of fraud” for courts to consider in deciding whether the requisite
21 intent existed that include:

1. Whether the transfer or obligation was to an insider;
2. Whether the debtor retained possession or control of the property transferred after the transfer;
3. Whether the transfer or obligation was disclosed or concealed;
4. Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. Whether the transfer was of substantially all of the debtor's assets.
6. Whether the debtor absconded;
7. Whether the debtor removed or concealed assets;

1 8. Whether the value of the consideration received by the debtor was reasonably
2 equivalent to the value of the asset transferred or the amount of the obligation
3 incurred;
4 9. Whether the debtor was insolvent or became insolvent shortly after the transfer
5 was made or the obligation incurred;
6 10. Whether the transfer occurred shortly before or shortly after a substantial debt
7 was incurred; and
8 11. Whether the debtor transferred the essential assets of the business to a lienor that
9 transferred the assets to an insider of the debtor.

10 Cal. Civ. Code § 3439.04(b). No single factor necessarily is determinative, and no minimum or
11 maximum number of factors dictates a particular outcome. *Ezra*, 537 B.R. at 931. In fact, the
12 presence of only one or two factors may be enough to support a finding of intentional fraud. *See*
13 *Filip v. Bucurencui*, 129 Cal. App. 4th 825, 834 (2005).

14 Here, Fox has admitted to his fraudulent intent, and the Trustee has presented substantial
15 evidence regarding a number of “badges of fraud” to establish “actual intent” under Section
16 3439.04(a)(1) of the Civil Code:

17 (a) Premier Cru was insolvent throughout the Relevant Period with liabilities far
18 exceeding its assets. (See Plea Agreement, at p. 4) at the time of Wine
19 Transfers (Answer, ¶¶ 25-27, 37) (see *Donell v. Kowell*, 533 F.3d at 770-71
20 (9th Cir. 2008));
21 (b) Premier Cru had incurred and was continuing to incur substantial debt by
22 incurring new fraudulent wine obligations throughout the Relevant Period
23 while it made transfers to creditors, like the Defendant (see Plea Agreement, at
24 p. 4);
25 (c) Premier Cru attempted to conceal the nature of the transactions with creditors
26 by falsifying records (see Plea Agreement, at p. 3), making excuses regarding
27 delay of wine shipments, and eventual cash settlement payments rather than
28 delivering promised wine (see *id.*, at pp. 4-5);
29 (d) Debtor concealed the nature of the transactions by: (i) making false statements
30 that it had purchased wines from its suppliers; (ii) promising delivery of wines
31 but failing to fill orders; (ii) entering into buy back agreements with no
32 intention of fulfilling those agreements; (iv) promising cash payments and then
33 delaying or failing to make the payments; (v) delivering checks that bounced;
34 and (iv) otherwise making efforts to conceal the fraud through false statements
35 to customers regarding the status of their orders;

- (e) Transfers to the Defendant were made while Premier Cru was under constant threat of potential lawsuits and at a time when complaints had actually been filed⁵ (see Plea Agreement, at p. 5; Exhibit “2”);
- (f) Premier Cru concealed and removed assets by (i) delivering wine to complaining customers that other customers had paid for (see Plea Agreement, at p. 5) and (ii) transferring large sums of money for Fox’s personal benefit (see *id.*, at p. 4);
- (g) Premier Cru made these obligations and transfers in exchange for less than reasonably equivalent value by pricing wines below market price, and with regard to the Defendant, the amount received Defendant was not reasonably equivalent to the value of the wine they received (see Nishi Decl., Ex. 17);
- (h) Premier Cru’s patterns, series of transactions, and course of conduct and cumulative effect whereby it acquired funds from new customers to fulfill obligations to existing creditors, including the Defendant, were designed to defraud creditors (see Plea Agreement, at pp. 3-4). No other inference is rational;⁶
- (i) The general chronology of events and the transactions under inquiry indicate the intent to defraud as the purpose of the fraudulent transactions was to provide liquidity to fuel the fraud and for Fox’s improper diversions and embezzlement. *See* Plea Agreement, at p. 4. In fact, Premier Cru’s fraudulent pre-arrival wine transactions naturally increased because of its need for more and more cash to pay for prior obligations (see *id.*, at p. 6);
- (j) Premier Cru’s conduct was both exceptional and peculiar by falsifying accounting records, making false statements to customers, and generally utilizing payments from later customers to fulfill obligations owed to prior customers (see *id.*, at pp. 3-4);
- (k) Premier Cru made significant misrepresentations by falsifying statements, concealing facts, and conducting its business under false pretenses. Specifically, Premier Cru made misrepresentations about: (a) its financial condition (see Plea Agreement, at p. 5); (b) its contractual relationships with suppliers and right to receive the wines in question (see *id.*, at p. 4); (c) its inventory balances (see *id.*, at p. 3); and (d) the purported reason for delays in wine delivery (*supra*, Parts I.C and D);

⁵ *In re Pringle*, 495 B.R. 467.

⁶ E.g., *In re Coombs*, 193 B.R. 557, 564 (S.D. Cal. 1996); *In re Kaiser*, 722 F.2d 1574, 1583 (2d Cir. 1983); *In re Meyer*, 307 B.R. 87, 91-92 (N.D. Ill. 2004); *In re Cohen*, 142 B.R. 720, 728 (Bankr. E.D. Pa. 1992); *In re Dereve*, 381 B.R. 309, 326 (Bankr. N.D. Fla. 2007).

- (l) Premier Cru's transactions with the Defendant and its other customers were questionable and not in ordinary course for a legitimate business⁷ as wine retailers do not, in the ordinary course of business, intentionally misrepresent their inventory and ability to fulfil sales orders (*Id.*);
- (m) Premier Cru entered into the transactions involved in its fraud under secrecy and haste, and the transactions were unusual.⁸ Specifically, Premier Cru disguised its pre-arrival sales using falsified documentation and misrepresentations to its customers (*see* Plea Agreement, p. at pp. 3-4. Furthermore, Premier Cru acted with haste in fulfilling fraudulent orders for those customers that complained repeatedly or forcefully (*see id.*, at 5);
- (n) Premier Cru, through Fox, was aware that it would not be able to fulfill orders to its customers (*see* Plea Agreement, at p. 4).⁹

9 The evidence presented clearly establishes that Premier Cru, through Fox, had the requisite
10 intent to hinder, delay, or defraud creditors under both Bankruptcy Code 548(a)(1) and Section
11 3439.04(a) of the Civil Code.

C. Defendant Cannot Establish a Defense Under Section 548(c) of the Bankruptcy Code and Section 3438.08(a) of the Civil Code.

14 Section 548(c) creates an exception to the liability of the initial transferee of a fraudulent
15 transfer where the transferee takes the property in (1) good faith and (2) for value. *See* 11 U.S.C.
16 548(c) (“[A] transferee . . . of such a transfer . . . that takes for value and in good faith has a lien on
17 or may retain any interest transferred . . . to the extent that such transferee gave value to the debtor in
18 exchange for such transfer[.]”) California’s defense statute is similar in form and substance to the
19 Bankruptcy Code’s defense against fraudulent transfer provisions. *Compare* 11 U.S.C. § 548(c)
20 with Cal. Civ. Code § 3439.08(a) (providing a safe harbor/good faith exception to transferees who
took in good faith and for reasonably equivalent value).¹⁰ The transferee defendant bears the burden

⁷ *Ryan Beck & Co. v. Campbell*, 2003 WL 22282380, at *7 (N.D. Ill. Oct. 2, 2003); *In re Saba Enters., Inc.*, 421 B.R. 626, 643 (Bankr. S.D.N.Y. 2009); *United States v. Johnston*, 245 F. Supp. 433, 441 (W.D. Ark. 1965).

²⁴ *In re Bernard L. Madoff Inv. Secs. LLC*, 445 B.R. 206, 223 n. 15 (S.D.N.Y. 2011); *Saba Enters., Inc.*, 421 B.R. at 643; *In re Russo*, 1 B.R. 369, 382 (Bankr. E.D.N.Y. 1979); *MFS/SunLife Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995).

²⁶ ⁹ *Van Dusen Airport*, 910 F. Supp. at 935.

²⁷ ¹⁰ The good faith value defenses under the Bankruptcy Code and the California Civil Code are
²⁸ essentially similar, with one minor difference. Bankruptcy Code § 548(c) uses the phrase “for
20

1 of proof to show that it is entitled to protection. *See Agric. Research*, 916 F.2d at 535 (burden is on
2 the transferee for invoking Sections 548(c)); Cal. Civ. Code § 3439.08(f)(1).

3 “[G]ood faith is not susceptible of precise definition,” and the analysis, being intensely
4 factual, must be made on a case-by-case basis. *McFarland v. GECC (In re Int'l Mfg. Grp., Inc.)*,
5 538 B.R. 22, 33 (Bankr. E.D. Cal. 2015) (citing). What is clear is that a defendant, such as
6 Nicholson, that has actual knowledge of the fraudulent activity of the debtor cannot establish a
7 good faith defense. The legislative committee’s intent makes clear that “[k]nowledge of the facts
8 rendering the transfer voidable would be inconsistent with the good faith that is required of a
9 protected transferee.” Cal. Civ. Code § 3439.08, Comment (1); *but see, e.g. Nautilus v. Yang*, 11
10 Cal.App.5th 33, 44 (2017); *Lewis v. Superior Court*, 30 Cal. App.4th 1850, 1858 (1995) (two
11 outlier cases requiring require a deliberate wrongful conduct on part of the transferee).

12 “Whether a transfer is voidable under [Section 3439.08(a)] is a question purely of
13 California law. Therefore, a federal court construing the statute must predict what the California
14 Supreme Court would rule if presented with the issue.” *Bank of Texas v. Patel*, 2017 WL 2985133,
15 at *4 (S.D. Cal. July 12, 2017). The California Supreme Court has yet to rule on the precise
16 definition of good faith. Federal courts considering the issue under California law have held that a
17 transferee lacks good faith if he or she has actual knowledge of facts which would suggest to a
18 reasonable person that the transaction was fraudulently made.¹¹

19 Courts consider whether “[f]acts that should have put a reasonable person on notice of a
20 fraudulent scheme, which would have been discovered through a diligent inquiry, constitute bad

22 value” while California Civil Code § 3439.08(a) uses the phrase “for a reasonably equivalent
23 value.”

24 ¹¹ *See, e.g., Brace v. Speier (In re Brace)*, 2017 WL 1025215, at *8 (B.A.P. 9th Cir. Mar. 15,
25 2017); *Burkart v. Bisessar (In re Singh)*, 2015 WL 1887939, at *13 (Bankr. E.D. Cal. Apr. 22,
26 2015); *Sec. & Exch. Comm'n v. Capital Cove Bancorp LLC*, 2015 WL 9701154, at *6 (C.D.Cal.
Oct. 13, 2015); *Guzman v. Pinch (In re Guzman)*, 2011 WL 478978, at *4 (Bankr. N.D. Cal. Feb. 4,
2011); *Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1076 (N.D. Cal. 1998); *In re Cohen*, 199 B.R. 709, 719 (B.A.P. 9th Cir. 1996). *But see Damian v. A Mark Precious Metals*,
2017 WL 6940515 (C.D. Cal. 2017) (dismissing defendant’s motion to dismiss without a finding
28 on good faith).

1 faith in receiving fraudulent transfers.” *Agretech*, 916 F.2d at 539. Courts analyze whether the
2 transferee had information or received “red flags” that should have placed the transferee on inquiry
3 notice of the fraudulent scheme or the insolvency of the debtor. *See Christian Bros. High Sch.*
4 *Endowment v. Bayou No Leverage Fund, LLC (In re Bayou Group, LLC)*, 439 B.R. 284, 314
5 (S.D.N.Y. 2010). “Facts sufficient to warrant a finding of inquiry notice [under California’s UFTA]
6 are also sufficient to defeat the good faith that is essential to the § 548(c) safe harbor.” *Plotkin*, 199
7 B.R. at 720.

8 Courts have found that certain facts trigger inquiry notice¹²: (a) the debtor’s possible
9 insolvency; (b) returned checks for insufficient funds; (c) the promise of exorbitant returns; and (d)
10 conduct that is inconsistent with industry standards. “Such inquiry notice suffices on the rationale
11 that some facts suggest the presence of others to which a transferee may not safely turn a blind
12 eye.” *Cohen*, 199 B.R. at 719 (citing *Bonded Fin. Servs.*, 838 F.2d at 893). The defendant’s level of
13 sophistication bears upon the ability to establish good faith defense. *E.g.*, *Global Money*
14 *Management, L.P. v. McDonnold*, No. 06CV34, 2008 WL 11337623, at * 7 (S.D. Cal. Feb. 27,
15 2008) (considering sophistication in determining whether defendant exercised good faith); *In re*
16 *Lake States Commodities, Inc.*, 253 B.R. 866, 878 (Bank. N.D. Ill. 2000). Here, Defendant cannot
17 prove the requisite elements for this defense.¹³

18 Defendant unequivocally (a) called Premier Cru a “**PONZI SCHEME**” and (b) promised to
19 file a civil suit for “**FRAUD**” and press “**CRIMINAL CHARGES**” against Fox (and his staff),”
20 on August 15, 2013. *See* Phelps Decl., Ex. 15 (Email from Nicholson to Fox and Glasby, dated

21 ¹² *See e.g.*, *Brown v. Third National (In re Sherman)*, 67 F.3d 1348 (8th Cir. 1995) (“A] transferee
22 does not act in good faith when has sufficient knowledge to place him on inquiry notice of the
23 debtor’s possible insolvency”); *Jobin*, 84 F.3d at 1338–39 (Checks for payments on investments
24 returned for insufficient funds or postdated); *Agric. Research.*, 916 F.2d at 539 (transfer received
25 “was grossly in excess of the value” transferee had provided); *Model Imperial*, 250 B.R. at 779
(bank transferee’s conduct “was inconsistent with industry practice and in violation of its own
written policies and procedures”).

26 ¹³ Even if Defendant could establish a good faith defense as to some of the transfers, Defendant
27 would still remain liable for the amount of the transfer that exceeds the amount of value paid in by
Defendant. *See* *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008).

1 August 15, 2013) at Nicholson000018 (emphasis added) and Ex. 5 (Defendant's RFA), at No. 4. In
2 fact, just three months prior to these statements, Defendant also accused Premier Cru of "deceitful
3 practices" and that he was "essentially defrauded into parting with hundreds of thousands of
4 dollars, under false pretenses[.]" *See id.*, Ex. 6 (Email from Nicholson to Michael Glasby, dated
5 March 28, 2013) at Nicholson000014 – 000015.

6 Defendant's own words reveal his knowledge of the fraud. He had the subjective
7 knowledge contemplated by the California legislature in enacting the good faith defense.
8 Separately, the Defendant cannot satisfy an objective standard. The overwhelming facts and
9 circumstances would have placed a reasonable person with Defendant's sophistication (*see, supra*,
10 ¶ 28) on inquiry notice of a fraudulent scheme. The red flags were numerous including, among
11 other things: (a) The publicly available information about fraud allegations, including public
12 postings and filed complaints; (b) Defendant's own negative experiences with Premier Cru's
13 inability to deliver the promised wines, and delays and excuses from Premier Cru (*see* Phelps
14 Decl., Ex. 5 (Defendant's RFA), at 2 (admitting that Premier Cru did not always deliver wines to
15 him within the period expected to receive them); (c) Premier Cru's delayed delivery with other
16 customers (*see id.*, Ex. 16 (Email from Nicholson to Fox, dated January 10, 2014) at
17 Nicholson000111); and (d) Premier Cru's delay with refunding customers (*see id.*, Ex. 14 (Email
18 from Nicholson to Premier Cru representative, Michael Glasby, dated June 26, 2013) at
19 Nicholson000017).

20 A reasonable inquiry as of August 2013 and a quick internet search would have revealed
21 substantial public allegations of fraud and Ponzi scheme on the part of Premier Cru. Defendant
22 would have discovered that Premier Cru was a fraudulent scheme if he conducted a diligent
23 inquiry. If Defendant had reviewed online forums, such as Yelp, he would have discovered that he was
24 not the only one experiencing constant delayed deliveries (*see* RJN., Ex. 3, at p. 3) and problems
25 with issuing refunds (*see id.*, Ex. 3, at p. 4). Defendant would have also learned of other customers'
26 warnings each other of Premier Cru's nonsensical excuses (*see* RJN., Ex. 4, at pp. 5, 8). Most
27 importantly, he would have discovered that other customers considered Premier Cru to be a wine
28

1 Ponzi scheme (*see id.*, Ex. 3, at pp. 5, 6 and *see id.*, Ex. 4, at p. 4) and/or pyramid scheme (*see id.*,
2 Ex. 3, at p. 6) and its employees “crooks” (*see id.* Ex. 3, at p. 8). Defendant would have also seen
3 that other customers considered legal options or remedies (*see id.*, Ex. 3, at p. 6) and in fact did file
4 lawsuits against Premier Cru and/or Fox for, among other things, fraud, conversion, unfair business
5 practices in connection with their promised and paid for wines (*see RJN*, Ex. 2). In addition, if
6 Defendant had contacted the foreign importers that Fox blamed as the cause behind the delay in
7 shipping Defendant’s wines, he would have discovered that his orders were fabricated or
8 inaccurate. *See id.* Ex. 1, at p. 4. Therefore, a diligent inquiry by the Defendant would have
9 revealed the Debtor’s fraudulent business practices or scheme.

10 As set forth herein, Defendant clearly cannot establish a good faith defense as to the Wine
11 Transfers as he was well on notice of the fraudulent scheme, having labeled it a “Ponzi scheme”
12 himself. Therefore, the entirety of the Wine Transfers is avoidable.

13 **D. The Trustee Is Entitled To Prejudgment Interest.**

14 Prejudgment interest on the fraudulent transfers is appropriate. *In re Slatkin, supra*, 525
15 F.3d at 820 (pursuant to Cal. Civ. Code § 3288, trial court has discretion to award prejudgment
16 interest on fraudulent transfers avoided under California’s UFTA); *see also Donell v. Kowell*, 533
17 F.3d 762, 772 (9th Cir. 2008) (once the trial court has identified the avoidable transfers, it has the
18 discretion to permit recovery of prejudgment interest on the fraudulent transfers from the date each
19 transfer was made). The statutory rate of interest is seven percent (7%). *Children’s Hospital and*
20 *Medical Center v. Bonta*, 97 Cal.App.4th 740, 775 (2002) (under California law, where
21 prejudgment interest is awarded on tort and other non-contractual claims the rate is 7% per annum).

22 The Trustee requests an award of prejudgment interest so that the estate may receive full
23 and fair compensation. Prejudgment interest would compensate the estate for the time value of the
24 lost use of the funds, to the benefit of the creditors of the estate. *See Schneider v. City of San Diego*,
25 285 F.3d 784, 789 (9th Cir. 2002) (purpose of prejudgment interest is to compensate for the loss of
26 use of money due as damages, thereby achieving full compensation for the injury those damages
27 are intended to redress).

1 At the applicable seven percent (7%) rate of interest, the total accrued prejudgment interest
2 on the claim from and after the date each of the Wine Transfers was made is \$57,210.33 if
3 calculated through February 28, 2019. *See* Richard Pierotti Declaration (“Pierotti Decl.”), ¶ 4. For
4 each day after February 28, 2019, an additional per diem amount of \$29.46 would accrue. *Id.* With
5 prejudgment interest included as of February 28, 2019, the Trustee requests that the Court enter a
6 judgment in the total amount of not less than \$210,797.94 against Defendant (\$153,586.84
7 principal judgment plus \$57,210.10 in prejudgment interest).

8 **E. An Order Adjudicating Facts Existing Without Substantial Controversy
9 Is Appropriate.**

10 Rule 56(d) of the Federal Rules of Civil Procedure provides that if summary adjudication is
11 not rendered upon the whole case or for all of the relief requested and a trial is necessary, the court
12 shall, if practicable, ascertain what material facts exist without substantial controversy and what
13 material facts are actually in good faith controverted, by examining the pleadings and the evidence
14 before it and interrogating counsel. It provides that the court shall thereupon make an order
15 specifying the facts that appear without substantial controversy.

16 If for some reason this Court declines to grant partial summary adjudication to the Trustee
17 and against the Defendant on Counts I and II with respect to the Wine Transfers. The Trustee
18 requests that the Court enter an order adjudicating that the facts, which are set forth in paragraphs 1
19 through 39 herein, exist without substantial controversy.

20 **IV. CONCLUSION**

21 The Trustee respectfully requests the Court enter Partial Summary Judgment in his favor
22 and against Defendant in the principal amount of \$153,586.84 plus all allowable prejudgment
23 interest or alternatively, for an order adjudication facts existing without substantial controversy.

24 Dated: January 29, 2019

DIAMOND MCCARTHY LLP

25 By: /s/ Kathy Bazoian Phelps

26 KATHY BAZOIAN PHELPS
27 Attorneys for Michael Kasolas,
28 Chapter 7 Trustee for Fox Ortega
Enterprises, Inc. dba Premier Cru